In Re: Paul D Christensen,

Case No. 04-60786 Chapter 7 Case

Debtor,

#### NOTICE OF HEARING AND MOTION FOR RELIEF FROM THE STAY

TO: Debtor(s) and other entities specified in Local Rule 9013-3.

- PRIMUS Automotive Financial Services, Inc. DBA Mazda American Credit moves the Court for the relief requested below and gives notice of hearing.
- 2. The Court will hold a hearing on this motion on September 28, 2004 at 1:00 PM o'clock, in Courtroom No. 2, at the United States Courthouse, 118 South Mill Street, Fergus Falls, MN.
- 3. Any response to this motion must be filed and delivered not later than September 23, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than September 17, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
- 4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this case was filed on July 2, 2004. The case is now pending in this court.
- 5. This motion arises under 11 U.S.C. §362(d) and Fed. R. Bankr. P. 4001. This motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 9006-1, 9013-1 through 9013-3, and 9017-1. Movant seeks relief from the automatic stay in §362(a) to foreclose its lien against the 2002 MAZDA PROTEGE WGN 5D (the collateral), and requests the court permit Movant to immediately enforce the order requested, lifting the 10 day stay imposed by Rule 4001(a)(3).

- 6. Movant requests relief from the stay for cause under §362(d)(1). Debtor is delinquent under the terms of the original contract with Movant. Movant requests relief under §362(d)(2). The Debtor has no equity in the collateral, and the collateral is not necessary to an effective reorganization.
- 7. Movant gives notice that it may, if necessary, call Heather Hendrix, or some other representative of Movant, from Movant's offices in Minnesota, to testify regarding the debt and value.
- 8. This notice of motion and motion also serve as notice of default required by <u>Cobb v. Midwest</u>

  <u>Recovery Bureau Co.</u>, 295 N.W.2d 232 (Minn.1980). If the default is not cured before the hearing, Movant will repossess the property promptly upon the Court signing the Order.
- 9. A separate Memorandum of Fact and Law is attached hereto and made a part hereof.

WHEREFORE, PRIMUS Automotive Financial Services, Inc. DBA Mazda American Credit moves the Court for an order modifying the automatic stay of §362(a) and such other relief as may be just and equitable.

Dated: September 1, 2004

### STEWART, ZLIMEN & JUNGERS, LTD.

/e/ Linda Jeanne Jungers

Linda Jeanne Jungers, Atty ID #5303X Attorneys for Movant 430 Oak Grove Street #200 Minneapolis, MN 55403 612-870-4100

This is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.

MINNESOTA DEPARTMENT OF PUBL PRIVER & VEHICLE SERVICES DIVIN 45 MINNESOTA ST., ST. PAUL, MN 5 CONFIRMATION OF LIEN PERFECTION - 1

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St. Paul, MN

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JF667

1ST SECURED PARTY

LIEN HOLDER

MAZDA AMERICAN CREDIT PO BOX 105614 ATLANYA GA 30348-5614

# **EXHIBIT A**

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**EXHIBIT B** 

ORIGINAL

### **Vehicle Summary With NADA Values** N.A.D.A Official Used Car Guide Monday, August 23, 2004

**Guide Edition:** 

Midwest Used Car Guide - July 2004

Vehicle Description:

2002 MAZDA

PROTEGE-4 CYL. WGN 5D 5

VIN: Stock #:	JM1BJ246021497693 #:			Weight: MSRP:	2716 \$16,335		
N.A.D.A. Ba	ise Values:	Retail:	\$11,525	Trade:	\$9,575	Loan:	\$8,625
Mileage Va Accessorie	alue (N/A Miles s Values	9)	N/A \$0		\$0		\$0
N.A.D.A Ad	justed Values:	Retail:	\$11,525	Trade:	\$9,575	Loan:	\$8,625
Appraiser A	Adjustment Val	ue	\$0				
Adjusted Va	alues:	Retail:	\$11,525	Trade:	\$9,575	Loan:	\$8,625
Accessories:							
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Alum/Alloy V Compact Dis			w/body w/body	w/body w/body	w/body w/body		

## **EXHIBIT** C

**Appraiser Adjustments:** 

NADA assumes no responsibility or liability for any errors or omissions or any revisions or additions made by anyone on this report.

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In Re: Paul D Christensen,

Debtor,

Case No. 04-60786 Chapter 7 Case

#### VERIFICATION FOR MOTION FOR RELIEF FROM STAY

I, Loretta Egan, Vendor Supervisor for PRIMUS Automotive Financial Services, Inc. DBA Mazda American Credit, the Creditor herein, declare under penalty of perjury that the following is true and correct according to the best of my knowledge, information and belief, and based on the Creditor's business records:

- I am legally competent to testify and am personally familiar with the debt owed by Debtor to the Creditor on account no. 31669920.
- 2. The Debtor owes the Creditor \$13,585.55, payoff amount as of August 23, 2004, plus accrued unpaid interest thereon since that date. The monthly loan payment is \$373.62. As of August 23, 2004, the loan payments are in arrears \$742.16 for payments owing since July 7, 2004. Yvonne Christensen is a cosigner on the loan documents and is jointly liable for the debt.
- The debt owed to the Creditor is secured by a perfected lien on a 2002 MAZDA PROTEGE
   WGN 5D. The current NADA published retail value of the collateral is \$11,525.00.
- 4. True and correct copies of the title documents are attached to the Motion as Exhibit "A". True and correct copies of the loan documents are attached as Exhibit "B".
- Loan documents require insurance be maintained to protect the Creditor's interest in the collateral.
   No evidence of insurance has been provided since filing.

Dated:

Loretta Egan

Vendor Supervisor for PRIMUS Automotive Financial Services, Inc. DBA MazdaAmerican Credit

National Bankruptcy Svc Center

PO Box 537950

Livonia, MI 48153-7950

In Re: Paul D Christensen, Case No. 04-60786 Chapter 7 Case

Debtor,

#### MEMORANDUM OF FACT AND LAW

PRIMUS Automotive Financial Services, Inc. DBA MazdaAmerican Credit ("Movant") submits this Memorandum of Fact and Law in support of its motion for relief from the stay.

### **FACTS**

Movant is the holder of a secured claim, and is thus a party in interest. Movant has a valid and perfected security interest in the collateral.

The total net balance due on the Contract is \$13,585.55 as of August 23, 2004. On information and belief, the collateral has an NADA retail value of \$11,525.00. NADA pages showing this collateral value are attached as Exhibit "C".

Movant's collateral is subject to depreciation in that the collateral is being used, subjecting the same to wear and tear, while Debtor is failing to make payments. The debt is co-signed by Yvonne Christensen. Either she or the Debtor is believed to have possession or control of the collateral.

There has been a further material default in that the Debtor has failed to comply with the Contract provision requiring Debtor to supply Movant with evidence of collateral insurance. On information and belief, the Debtor has failed to maintain such insurance.

### **ARGUMENT**

Pursuant to 11 U.S.C. §362(d)(1), a creditor is entitled to relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such creditor." In this case, there is a lack of adequate protection as follows:

• Failure to make the payments required by the Contract since July 7, 2004.

Failure to make payments due post petition under the Contract.

Failure to maintain physical damage insurance on the collateral.

Movant has not been provided with adequate protection of Movant's interest in the collateral.

Such circumstances constitute cause, within the meaning of §362(d)(1), justifying relief from the stay.

See, United States Association of Texas v. Timbers of Inwood Association, Ltd. (In re Timbers of Inwood

Association, Ltd.), 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed. 2d 740 (1988); In re Reinbold v. Dewey County

Bank, 942 F.2d 1304, 1306 (8th Cir. 1991). Pursuant to 11 U.S.C. §362(g), the burden is on the Debtor

to prove adequate protection and/or absence of cause.

Pursuant to 11 U.S.C. §362(d)(2), relief from the automatic stay is also appropriate if the Debtor

has no equity in the property and the property is not necessary to an effective reorganization. See, In re

Gellert, 55 B.R. 970 (Bkrtcy. D.N.H. 1983). In the present case, the balance due Movant on the Contract

is \$13,585.55. It appears Debtor has no equity in the collateral. No evidentiary hearing is required on the

issue of equity unless Debtors dispute it. Powers v. American Honda Finance Corp., 216 B.R. 95, 97

(N.D.N.Y. 1997). There is no reorganization proposed by the Debtor in this Chapter 7 case. Pursuant to

11 U.S.C. §362(g), the burden is on Debtor to establish that collateral is necessary for reorganization.

Bankruptcy Rule 4001(a)(3) imposes a stay of 10 days which the court may, in its discretion,

order is not applicable so that Movant may immediately enforce and implement the order granting relief.

Advisory Committee Notes to 1999 Amendments to Bankruptcy Rule 4001.

Dated: September 1, 2004

STEWART, ZLIMEN & JUNGERS, LTD.

/e/ Linda Jeanne Jungers

Linda Jeanne Jungers, Atty ID #5303X

Attorneys for Movant

430 Oak Grove Street #200

Minneapolis, MN 55403

612-870-4100

In Re: Paul D Christensen,

Case No. 04-60786 Chapter 7 Case

Debtor,

### UNSWORN CERTIFICATE OF SERVICE

I, Linda Jeanne Jungers, declare under penalty of perjury that on <u>September 2, 2004</u>, I mailed copies of the attached Notice of Hearing and Motion for Relief from the Stay with Exhibits, Verification, Memorandum of Fact and Law, Certificate of Service, and proposed Order, by first class mail postage prepaid to each entity named below at the address stated below for each entity.

Paul D Christensen 16777 County Rd 4 Osakis, MN 56360

Yvonne Christensen 16777 County Rd 4 Osakis, MN 56360

Logan M Moore Attorney at Law 1118 Broadway Alexandria, MN 56308

Tamara L Yon Trustee in Bankruptcy PO Box 605 Crookston, MN 56716

U.S. Trustee 1015 U.S. Courthouse 300 South 4th Street Minneapolis, MN 55415

Executed on: September 2, 2004

Signed: /e/Linda Jeanne Jungers Linda Jeanne Jungers STEWART, ZLIMEN & JUNGERS 430 Oak Grove Street, #200 Minneapolis, MN 55403

PRIMUS Automotive Financial Services, Inc. DBA Mazda American Credit's Motion for an order granting relief from the stay came before the Court on September 28, 2004 at 1:00 PM o'clock.  Based on the arguments of counsel, all the files, records and proceedings herein, the court being advi in the premises, and the court's findings of fact and conclusions of law, if any, having been stated or and read in open court following the close of evidence,  IT IS HEREBY ORDERED:  1. The automatic stay is modified to permit PRIMUS Automotive Financial Services, Inc. DBA Mazda American Credit to repossess and sell the  2002 MAZDA PROTEGE WGN 5D, VIN JM1BJ246021497693  in accordance with applicable state law.	60786 Case							
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2002 MAZDA PROTEGE WGN 5D, VIN JM1BJ246021497693	1							
in accordance with applicable state law.								
2. Notwithstanding Federal Rule of Bankruptcy Procedure 4001(a)(3), this Order is effective								
immediately.								
Dated: United States Bankruptcy Judge								